MT LEGISLATIVE HISTORY

Chapter 338 1977

Bill H (S) 149 Original bill & hist. ___C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Mar 10	✓C	Hearing Date(s)	Jan 28	✓C
	Mar 17	✓C		Feb 10	✓C
		___C			___C
		___C			___C
Date Out	Mar 10	✓C		Feb 10	✓C

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

FORTY-FIFTH LEGISLATIVE SESSION

1977

COMMITTEE ON JUDICIARY

BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CONCURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CONCURRED IN DATE
S.B. 56	1-6-77	1-13-77	1-20-77		1-20-77				
S.B. 58	1-7-77	1-17-77	1-17-77	1-17-77					
S.B. 58	Rereferred 1-20-77	1-21-77	1-21-77			1-21-77			
S.B. 67	1-8-77	1-19-77	2-18-77		2-18-77				
S.B. 70	1-10-77	1-17-77	1-17-77			1-17-77			
S.B. 75	1-11-77	1-25-77	2-4-77		2-4-77				
S.B. 92	1-13-77	1-20-77	1-20-77	1-20-77					
S.B. 95	1-13-77	1-20-77	1-21-77		1-21-77				
S.B. 97	1-13-77	1-27-77	2-4-77			2-4-77			
S.B. 115	1-17-77	1-21-77	2-10-77			2-10-77			
S.B. 119	1-18-77	1-21-77	1-29-77			1-29-77			
S.B. 125	1-18-77	1-22-77	2-21-77		2-21-77				
S.B. 125	2-22-77	2-23-77	2-23-77			2-23-77			
S.B. 149	1-19-77	1-28-77	2-10-77			2-10-77			
S.B. 153	1-19-77	2-2-77	2-10-77			2-10-77			
S.B. 156	1-20-77	1-26 & 1-31-77	1-31-77			1-31-77			

(Use Separate Sheet for [illegible] House Bills, and Resolutions)

Senate BILL NO. 149

INTRODUCED BY Waldron

By request Montana Board of Crime Control

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR THE IMPOSITION OF THE DEATH PENALTY IN CERTAIN CASES; TO PROVIDE PROCEDURES AND REQUIREMENTS FOR THE AUTHORIZATION OF SUCH PENALTY; TO PROVIDE FOR A SEPARATE SENTENCING HEARING TO DETERMINE THE EXISTENCE OR NONEXISTENCE OF AGGRAVATING OR MITIGATING CIRCUMSTANCES; TO PROVIDE THAT THE DEATH PENALTY MAY NOT BE IMPOSED UNLESS THE COURT FINDS ONE OR MORE OF THE AGGRAVATING CIRCUMSTANCES AND FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY; TO PROVIDE THAT THE DETERMINATION OF THE COURT SHALL BE SUPPORTED BY SPECIFIC WRITTEN FINDINGS OF FACT; TO PROVIDE FOR AUTOMATIC REVIEW OF A JUDGMENT OF CONVICTION AND SENTENCE OF DEATH; AMENDING SECTIONS 94-5-102, 94-5-303, 94-5-617, AND 94-5-622, R.C.M. 1947; REPEALING SECTIONS 94-5-105, 94-5-304, AND 95-2206.1, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Sentence of death -- hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a

separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in [sections 3 and 4] for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

Section 2. Sentencing hearing -- evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Section 3. Aggravating circumstances. Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnaping which resulted in the death of the victim.

Section 4. Mitigating circumstances. Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

Section 5. Consideration of aggravating and mitigating factors in determining sentence. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in [sections 3 and 4] and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

Section 6. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in [sections 3 and

4]. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

Section 7. Automatic review of sentence. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana as provided for in [sections 8 through 10].

Section 8. Review of death sentence — priority of review — time for review. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record, unless the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

Section 9. Transcript and records of trial transmitted. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

Section 10. Supreme court to make determination as to the sentence. The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall

determine:

(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in [sections 3 and 4]; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

Section 11. Section 94-5-102, R.C.M. 1947, is amended to read as follows:

"94-5-102. Deliberate homicide. (1) Except as provided in ~~section~~ 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, ~~or~~ an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape, or any other felony which involves the use or threat of physical force or

violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in ~~section 94-5-105,~~ [sections 1 through 10 of this act] or by imprisonment in the state prison for any term not to exceed ~~one hundred (100)~~ years."

Section 12. Section 94-5-303, R.C.M. 1947, is amended to read as follows:

"94-5-303. Aggravated kidnaping. (1) A person commits the offense of aggravated kidnaping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) A person convicted of the offense of aggravated

kidnaping shall be punished by death as provided in ~~section 94-5-304,~~ [sections 1 through 10 of this act] or be imprisoned in the state prison for any term not to exceed ~~one hundred (100)~~ years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ~~ten (10)~~ years."

Section 13. Section 94-5-617, R.C.M. 1947, is amended to read as follows:

"94-5-617. Protection of life and health of infant. (1) A person commits the offense of criminal homicide, as defined in sections 94-5-101 through ~~94-5-105~~ 94-5-104, if he purposely, knowingly, or negligently causes the death of a premature infant born alive, if such infant is viable.

(2) Whenever a premature infant which is the subject of abortion if is born alive and is viable, it becomes a dependent and neglected child subject to the provisions of state law, unless:

(a) the termination of the pregnancy is necessary to preserve the life of the mother; or

(b) the mother and her spouse, or either of them, have agreed in writing in advance of the abortion, or within seventy-two (72) hours thereafter, to accept the parental rights and responsibilities of the premature infant if it

survives the abortion procedure.

(3) No person may use any premature infant born alive for any type of scientific research, or other kind of experimentation except as necessary to protect or preserve the life and health of such premature infant born alive.

(4) The department shall make regulations to provide for the humane disposition of dead infants or fetuses.

(5) Violation of subsection (3) of this section is a felony."

Section 14. Section 94-5-622, R.C.M. 1947, is amended to read as follows:

"94-5-622. Penalties. (1) A person convicted of criminal homicide under this act is subject to the penalties prescribed by sections 94-5-101 through ~~94-5-105~~ 94-5-104.

(2) A person convicted of a felony other than criminal homicide under this act is subject to a fine not to exceed one thousand dollars ($1,000), or imprisonment in the state prison for a term not to exceed five (5) years, or both.

(3) A person convicted of a misdemeanor under this act is subject to a fine not to exceed five hundred dollars ($500), or imprisonment in the county jail for a term not to exceed six (6) months, or both."

Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in

one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 16. Repealer. Sections 94-5-105, 94-5-304, and 95-2206.1, R.C.M. 1947, are repealed.

-End-

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 28, 1977

The meeting of this committee was called to order by Senator Turnage, Chairman, at 9:40 a.m. on the above date in Room 405 of the State Capitol Building.

ROLL CALL:

All members were present except Senator Roberts who was excused.

CONSIDERATION OF SENATE BILLS 149 and 214:

Senator Hazelbaker, District 41, sponsor of Senate Bill 149, explained that this bill has been put together by the Montana Law School, and he had been requested to sponsor it.

A proponent of S.B. 149, Brinton B. Markle of the Montana Justice Project, told the committee that the American Bar Association has refused to take a stand on whether a jury or a judge should deliver a sentence in the case of capital punishment, and that this is an important issue in Montana. He drew the committee's attention to a report (See Exhibit #1) regarding the constitutionality of the Death Penalty in Montana, and he read excerpts about jury sentencing. (See Exhibit #2)

The next proponent was Tom Dowling, Lewis & Clark County Attorney, who told the committee he was probably the only one present who has ever asked that anybody be hanged. He further said that he did not think that he could ever do it, and that he does not believe that a jury in his county would ever sentence anyone to hang. He also said that he believes a jury should be kept out of sentencing.

Charles M. O'Reilly, Montana Justice Project, a proponent, told the committee that he agreed with the previous witnesses.

At this time, the Chairman called the opponents of S.B. 149 and 214. There were none present who wished to testify. He then requested Mr. Larry Elison, a professor from the Montana Law School and an attorney on the governor's staff, to interpret these two bills for the committee. Mr. Elison said that he thinks that both bills will meet constitutional requirements, but feels more confident about S.B. 149. He then said that he is very much committed to the idea that the judiciary provide sentencing and not the jury. He suggested that the committee dovetail this bill into existing statutory design so that it will fit into the existin code.

Senator Hazelbaker said that he felt a jury would be expensive and time consuming.

Senator Turnage agreed with Larry Elison about S.B. 214 and asked the committee that they do not recommend S.B. 214 , the bill prcposed by the Board of Crime Control. He then thanked the witnesses and opened the meeting to questions by committee members.

The Chairman then asked that Mr. Elison help in making any amendments to Senate Bill 149. Mr. Elison said that he would be glad to help.

There being no further business before the committee at this time, the committee adjourned at 10:25 a.m..

Jean A. Turnage

SENATOR JEAN A. TURNAGE, Chairman

ROLL CALL

JUDICIARY COMMITTEE

45th LEGISLATIVE SESSION - - 1977 Date 1/28/77

NAME	PRESENT	ABSENT	EXCUSED
TURNAGE, Jean, Chairman	✓		
ROBERTS, Joe, Vice-Chairman			✓
MURRAY, William	✓		
OLSON, Stuart	✓		
LENSINK, Everett	✓		
REGAN, Pat	✓		
TOWE, Tom	✓		
WARDEN, Margaret	✓		

Each day attach to minutes.

SB 149, 214

CONSTITUTIONALITY OF THE DEATH PENALTY IN MONTANA

Montana's mandatory death penalty provisions, section 94-5-105 (2), R.C.M. (1947), dealing w deliberate homicide involving the killing of a police officer, and Section 94-5-304, R.C.M., (1947), deali with aggravated kidnapping where the victim is dead as a result of the criminal conduct, are unequiv cally unconstitutional. Montana's discretionary death penalty provision, Section 94-5-105 (1) (a) throu (e) dealing with sentence of death for enumerated categories of deliberate homicide and providing f consideration of mitigating circumstances, is constitutional.

It is possible that Montana's procedures for review of death sentences are constitutionally inadequa so as to render any imposition of the death penalty unconstitutional whether it be imposed pursuant to t mandatory or discretionary death penalty provisions.

INTRODUCTION

The purpose of this writing is to assess the constitutionality of Montana's death penalty statutes relating to the crimes of deliberate homicide, Section 94-5-105, and aggrevated kidnaping, Section 94-5-304, R.C.M. 1947, in light of the recent U.S. Supreme Court cases dealing with the subject. See: **Gregg v Georgia,** ____U.S.____, 96 S. Ct. 2909 (1976); **Proffitt vs. Florida,** ____U.S ____, 96 S. Ct. 2960 (1976); **Jurek v. Texas,** ____U.S.____, 96 S. Ct. 2950 (1976); **Woodson v. North Carolina,** ____U.S____, 96 S. Ct. 2978 (1976); and **Roberts v. Louisiana,** ____U.S.____, 96 S. Ct. 3001 (1976).

It should be noted that the proposed legislation is more than an attempt to cure the obvious or definite constitutional defects in the existing law. Rather, it represents an attempt to completely overhaul the procedures utilized in determining when and upon whom the death penalty is to be imposed. In other words, the decision to change or add to a particular existing provision was not based solely on that particular provision's ability to pass constitutional muster should it be tested in the U.S. Supreme Court, but also upon a desire to improve the procedure involved to insure that such an ominous penalty as death is fairly and justly meted out.

THE DEATH PENALTY PER SE

The five recent Supreme Court cases on the constitutionality of the death penalty address and answer many questions left unanswered by the voluminous and confusing plurality opinion in **Furman v. Georgia,** 408 U.S. 238 (1972). Assuming no radical changes in the philosophy or membership of the court in the near future it now appears clear that the punishment of death for the crime of murder is not constitutionally invalid per se under the 8th and 14th amendments to the U.S. Constitution. The 8th amendment, according t the court is flexible, and "must draw its mea in from the evolving standards of decency that r r the progress of a maturing society." **Gregg v Georgia,** 96 S. Ct. at p. 2925. The court view post-Furman enactment by 35 states of new deat penalty statutes as strong evidence of society endorsement of the death penalty and as an indi cation of current "standards of decency". **Gregg v. Georgia,** at p. 2928. Acknowledging that retribution and deterrence remain valid sentencing considerations, the court expressed what should be the final word on the constitutionality of the death penalty per se:

> "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it". **Gregg v. Georgia,** at p. 2932.

PROCEDURAL CONSIDERATIONS IN IMPOSING THE DEATH PENALTY — CONSTITUTIONALLY MANDATED REQUIREMENTS AND ACCEPTABLE METHODS OF FULFILLING THEM.

Having decided that the death penalty is not, per se, unconstitutional cruel and unusual punishment under the 8th and 14th amendments, a more detailed analysis of the procedural requirements deemed necessary by the court in order to constitutionally impose the penalty is necessary. The following discussion attempts to treat the various procedural provisions of the constitutionally approved death penalty statutes of Georgia, Texas, and Florida both in terms of what the Supreme Court considers to be mandatory constitutional prerequisites and what it considers to be adequate or desirable approaches or procedures.

The Georgia statutory procedure held constitutional in **Gregg v. Georgia**, supra, sets out the various procedural requirements dealt with in all three cases. These are:

(1) jury sentencing;

(2) a bifurcated procedure for determining guilt and punishment;

(3) a consideration by the sentencing body of enumerated aggravating factors, one of which must be found in order to impose the death sentence, and any mitigating factors (not enumerated in Georgia);

(4) an automatic review procedure requiring the state supreme court to review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. (See: **Gregg v. Georgia,** 96 S. Ct. 2932-2941, and Ga. Code Ann. § 27-2534.1 and § 27-2537).

It is apparent that the procedure of jury sentencing, although present in Georgia's constitutionally approved statutory scheme, is not a constitutional requirement. The Florida procedure, also held constitutional, (see: **Proffit v. Florida,** supra) provides only for an advisory opinion by the jury as to the sentence, while the actual sentence is determined by the judge. The court makes this clear in **Proffit v. Florida, 96 S. Ct. at j. 2966,** where it stated:

> "This court has pointed out that jury sentencing in a capital case can perform an important societal function, (citation omitted), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, . . ."

Therefore, the fact that all sentences in Montana are imposed by a judge pursuant to section 95-2212, R.C.M. (1947) does not present a procedural problem in constitutionally imposing the death sentence. The proposed legislation, therefore, does not make any change in this area since it would amount to a radical and unnecessary change in Montana's criminal procedure.

The Georgia, Texas, and Florida procedures all provided for a bifurcated proceeding, i.e., separate and distinct proceedings for determining guilt on the one hand and punishment on the other. However this requirement can best be viewed as being constitutionally required only in states where the jury is included in the sentencing process as a sentencing or advisory body. In such a system as the court points out in **Gregg v. Georgia,** 96 S. Ct. at p. 2933:

> "Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."

And at 96 S. Ct. p. 2935, the court further states:

> "As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information".

This infirmity is not present in a judicial sentencing jurisdiction such as Montana where the procedure is automatically bifurcated due to the separate functions of judge and jury in fixing guilt and determining punishment. In general, as a matter of necessity and practice, a separate sentencing hearing is held in Montana's district courts, however, for clarity, the proposed legislation expressly requires a separate sentencing hearing and specifies what is to be considered at that hearing. Although perhaps not constitutionally required due to the use of judicial rather than jury sentencing in Montana, the provisions (sections 1 and 2 of the proposed legislation) were considered desirable as procedural guidelines for a comprehensive statutory scheme for the imposition of the death penalty in Montana.

If there is one immutable constitutional principal that rings crystal clear from a reading of the five recent Supreme Court decisions on the death penalty being considered herein, it is that any state which desires to impose the death penalty **must** as an integral part of its procedure for imposing the penalty, provide for the consideration of the character and propensities of the individual offender and the circumstances of the particular offense. The statutes of Georgia Texas, and Florida approved by the court had met this constitutional requirement by providing that the sentencer consider both aggravating and mitigating

circumstances relating to the offense and the offender before passing a sentence of death. All three of the states' statutes enumerated aggravating factors which narrowed the situations in which the death penalty could be imposed based on either the nature of the offender or the offense. The Montana statute concerning the death sentence for deliberate homicide, 94-5-105, and the statute concerning sentence of death for the narrow category of kidnaping in which the victim is dead as a result of the criminal conduct, 94-5-304, therefore appear constitutionally adequate in this regard. Whether or not specific mitigating factors have to be statutorily enumerated is another question, however. It appears that the answer is no, since only the Florida statute contained such an enumeration, (see: Fla. Stat. Ann. § 921.141) while the Georgia statute mentioned consideration of mitigating factors only in a general sense without enumerating them (see: Ga. Code Ann. § 27-2534.1), and the Texas statute did not even expressly speak of consideration of mitigating circumstances but was only construed to include such consideration by the Texas Court of Criminal appeals (see: Texas Penal Code § 19.03 and Texas Code of Crim. Proc., Art. 37.071). It is equally evident, however, that although mitigating factors need not be statutorily enumerated, **they must be allowed to be considered** in determining sentence. The court articulated this constitutitonal requirement in **Jurek v. Texas,** 96 S. Ct. at p. 2956 where, it stated:

> " . . . a sentencing system that allowed the jury to consider only aggravating factors would almost certainly fall short of providing the individualized sentencing determination that we today have held in **Woodson v. North Carolina,** (citation omitted) to be required by the Eight and Fourteenth Amendments. . . . Thus, in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital sentencing system must allow the sentencing authority to consider mitigating circumstances."

Turning again to the Montana statutes, it appears that this constitutionally mandated procedural requirement is adequately provided for in the case of section 94-5-105 (1) (a) through (e) but fatally absent in sections 94-5-105 (2) and 94-5-304. The provision in 94-5-105 (1) which provides for imposition of the death sentence for enumerated types of deliberate homicide "unless there are mitigating circumstances" has unwittingly salvaged the constitutionality of that section, while the removal of such language by amendment in 1974 in regard to the killing of a police officer (94-5-105 (2)) and aggravated kitnaping where the victim is killed (94-5-304) has rendered those provisions unconstitutional under the recent cases.

The proposed legislation adopts the Florida scheme of enumerating specific mitigating factors which are to be considered in imposing the death penalty. As has already been noted, this is probably not constitutionally required, but in both Georgia (see: **Coley v. State,** 231 Ga. 829, 834, 204 S.E. 2nd 612, 615) and Texas (see: **Jurek v. Texas,** 522 S.W. 2nd 939, 940) where mitigating factors were not enumerated, they were supplied by judicial construction or interpretation. Due to this fact and the heavy emphasis which the Supreme Court places on the necessity of providing the sentencing authority with adequate standards and guidelines to insure objective consideration of the particularized circumstances of the individual offense and offender, the adoption of an enumerated list of mitigating circumstances was deemed a desirable change in the Montana law.

The last, but certainly not the least, of the procedural requirements discussed by the court is that of automatic appeal or review of death sentences. All three of the statutory schemes approved by the cases provide for this type of automatic expeditious review. (See: Ga. Code Ann. § 27-2537, Fla. Stat. Ann. § 921.141 (4) and Texas Code of Crim. Proc., Art. 37.071). Whether or not a special type of "automatic" review of all death sentences is constitutionally mandated under the 8th and 14th amendments is not entirely clear from reading the decisions. At the very least, however, the court expresses an extremely strong preference for the utilization of such a review procedure. Speaking of the Georgia statute which specifies that "automatic" review shall consist of a determination of whether the death sentence was imposed under the influence of passion and prejudice or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, the court in **Gregg v. Georgia,** 96 S. Ct. at p. 2940 stated:

> "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty."

In the case of the Florida statute which provides for automatic review but does not specify a par-

ticular type or form of review, the court noted in **Proffitt v. Florida,** 96 S. Ct. 96 at p. 2966 that since "the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible". The court also noted the Florida Supreme Court case of **State v. Dixon,** 283 So. 2d 1, (1973), which adopted the concept of proportionality review in death sentence cases. In that case, the Florida Supreme Court considered its function to be to:

> "guarantee . . . that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached under similar circumstances in another case . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." **State v. Nixon,** at p. 10.

The question is, then, are the existing avenues of review and appeal, now open to the recipient of the death penalty in Montana, constitutionally adequate? The two forms of review available in Montana are direct appeal pursuant to Chapter 24, Title 95, R.C.M. (1947) and sentence review before the Montana Sentence Review Division pursuant to Chapter 25, Title 95, R.C.M. (1947). To begin with, neither of these methods of review is automatic. They both must be initiated and perfected by the convicted defendant, and secondly they do not specify any guidelines, (as did the Georgia statute), as to what factors are to be reviewed in order to insure that the death penalty is not imposed arbitrarily or freakishly. One might successfully argue that, despite these insufficiencies, Montana's provisions are adequate as applied on a case by case basis. That is, if a person under sentence of death is in fact given an appeal or sentence review, and if the reviewing body does in fact conduct a comparison or proportionality type of review to insure that the sentence is not disproportionate to those imposed in similar cases, then the sentence of death in the particular case is constitutionally valid since a "meaningful" appellate review as required by the Supreme Court cases has in fact been afforded. However, in order to avoid this problem of interpretation and due to the emphasis placed by the court upon the need for extraordinary safeguards and procedures to fairly impose the death penalty due to the inherently "unique" and "final" nature of the penalty it was considered both necessary and desirable to create for Montana a special "automatic" review procedure to be utilized in death sentence cases. The proposed legislation provides that the Montana Supreme Court conduct this review, rather than the Sentence Review Division due again to the serious nature of the penalty being reviewed. It should be noted that the procedure adopted in the proposed bill is not carved in stone since there are many conceivable ways of insuring the type of meaningful review required by the U.S. Supreme Court. The procedure adopted is, however, patterned after the Georgia procedure for which the Court expressed a marked preference.

CONSTITUTIONALITY OF MANDATORY DEATH PENALTY STATUTES — MONTANA'S MANDATORY PROVISIONS FOR KIDNAPING *(94-5-304)* AND KILLING A PEACE OFFICER *(94-5-105(2))*.

Subsequent to **Furman v. Georgia,** supra, which held that because of the uniqueness of the death penalty it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an "arbitrary", "capricious" or "freakish" manner, the states were left with the problem of interpreting the nine separate opinions of the case in order to discover what constitutional requirements must be met in order to retain and impose the death penalty. The various states have adopted two basic approaches in the attempt to comply with the pronouncements of the **Furman** decision. The first approach was characterized by specifying the factors to be weighed and the procedures to be followed in imposing the death sentence, and the second by making the death penalty mandatory for specified crimes. (See: **Gregg v. Georgia, supra,** p. 2928, footnote 23 for complete citations to all state post-Furman statutes). In view of **Woodson v. North Carolina,** and **Roberts v. Louisiana,** supra, it is apparent that the latter approach of making the death penalty mandatory is unconstitutional under the 8th and 14th amendments. In these two cases the court was dealing with mandatory death penalty statutes for specific types of crimes or categories of crime. Addressing the constitutionality of the North Carolina statute the court said:

> "A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in Furman was the conviction that the vesting of **standardless** sentencing power in the jury violated the Eighth and

Fourteenth Amendments." **Woodson v. North Carolina**, at p. 2990. (emphasis added)

It is thus apparent from **Woodson** that the **Furman** decision is to be interpreted as a limited holding condemning only the "standardless" exercise of discretion and not the mere existance of discretion in the sentencing process. In the words of the court, "mandatory statutes in response to Furman have simply papered over the problem of unguided and unchecked jury discretion". **Woodson v. North Carolina** at p. 2990. The common misconception that mandatory death penalties were the answer to **Furman** is emphatically refuted in **Woodson v. North Carolina** at p. 2991 where the court stated:

> "While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death it does **not** fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."

Perhaps the greatest constitutional defect inherent in the mandatory death penalty statutes condemned by the court was their failure to allow the particularized consideration of the individual offender and the circumstances of the offense. In the words of the court:

> " . . . we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, (citation omitted), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". **Woodson v. North Carolina,** at p. 2991.

In **Roberts v. Louisiana,** the same basic issue was resolved in the same manner. There, however, the court was confronted with a mandatory death penalty statute which was significantly more limited in its scope of application in that it limited the mandatory death penalty to five categories of homicide. Here again, however, the court struck down the statute, stating at 96 S. Ct. 3006:

> "The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender —is not resolved by Louisiana's limitation of first degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of **mitigating factors** presented by the circumstances of the particular crime or by the attributes of the individual offender. (emphasis added)

With the possible exception of the unique category of a homicide committed by a person serving a life sentence, (see **Woodson v. North Carolina,** 96 S. Ct. 2983, footnote 7, and **Roberts v. Louisiana,** 96 S. Ct. 3006, 3007, footnote 9) it appears almost certain that any form of mandatory death penalty, regardless of its narrow scope or limited application to specific types or categories of crimes is unconstitutional.

This leads to the inescapable conclusion that section 94-5-304 R.C.M. 1947, providing for a mandatory sentence of death for aggravated kidnaping where the victim is dead as a result, is patently unconstitutional. The statute provides:

> "94-5-304. Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct."

Unfortunately, the 1974 amendment, which deleted the words "unless there are mitigating circumstances" which appeared in the former section 94-5-304, has the effect of rendering it unconstitutional under the recent Supreme Court cases. (see: **Woodson** and **Roberts,** supra).

A similar situation exists in regard to subsection (2) of section 94-5-105 R.C.M. (1947) which was added by amendment to that section in 1974. That subsection creates a mandatory death penalty in the case of a deliberate homicide in which the victim is a peace officer killed while performing his duty. The amendment removed this category of deliberate homicide from the list of categories under subsection (1) of section 94-5-105 for which the death penalty is required "unless there are

mitigating circumstances", and made the death penalty absolutely mandatory for killing a peace officer. The subsection provides:

> "94-5-105. Sentence of death for deliberate homicide.
> (2) Notwithstanding the provisions of subsection (1) and **regardless of circumstances,** when a defendant is convicted of the offense of deliberate homicide under subsection (1) (a) of section 94-5-102 in which the victim was a peace officer killed while performing his duty the court **shall impose** a sentence of death." (emphasis added).

Therefore, due to the unqualified mandatory character of sections 94-5-105 (2) and 94-5-304 and their resulting failure to provide the constitutionally indispensible requirement that the character and record of the individual offender and the circumstances of the particular offense be considered in determining whether or not to impose the death penalty, these statutes can only be regarded as unconstitutional and are in need of revision if the death penalty is to be effectively imposed for these crimes.

The proposed legislation cures the constitutional defect of these sections by adopting a single procedural system for imposition of the death penalty in all cases. It totally rejects the imposition of mandatory death sentences and adopts a constitutionally approved procedure consisting of a separate sentencing hearing in which both aggravating and mitigating circumstances relating to the offender and the offense are considered, and a procedure for automatic review of all death sentences in accordance with specific statutory guidelines. (See: **Gregg v. Georgia, Jurek v. Texas, and Proffit v. Florida,** supra).

(Exhibit #2)

ant will commit other crimes to the types of programs and facilities which may induce a change in the pattern of activity which led to the offense.

It must be granted, of course, that many trial judges lack the necessary expertise to make a proper sentencing decision. The answer does not lie, however, in retention of the power by an even less qualified jury. The answer lies in better trained and better selected judges, plus the help that devices such as those suggested in Parts IV and VII of this report can offer. These, coupled with a requirement that the sentencing decision be forced into the open (see § 5.6, *infra*) and subject to review (see ABA STANDARDS, APPELLATE REVIEW OF SENTENCES [Tent. Draft, April 1967]), at least offer the hope of more constructive sentences. That this approach may still fall short of perfection is of a wholly different order than the clear inadequacy of leaving the determination to an uninformed and unprofessional jury.

c. Capital punishment

The Advisory Committee recognizes, on the other hand, that there are considerations which argue for retention of a role for the jury in cases where imposition of the death penalty is at issue. Indeed, the pattern in capital cases in this country, in contrast to cases where the death penalty is not at stake, is to involve the jury in one way or another in the sentencing decision. See Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 n.1 (1967); MODEL PENAL CODE, Appendix D (Tent. Draft No. 9, 1959).

The major factors which have produced this result are threefold: the strong possibility that a jury may refuse to convict in some cases unless it can assure itself that the defendant will not be executed; the belief that imposition of the death penalty ought to reflect more of a community consensus than can be marshalled by one man; and the resistance of judges to a procedure that will devolve upon them so momentous and irrevocable a decision. See generally Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953); MODEL PENAL CODE § 201.6, comment, pp. 73-74 (Tent. Draft No. 9, 1959). Compare GREAT BRITAIN, REPORT OF THE

Submitted by
Brinton Markle, Del. Crime Com'n

ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-53, ¶¶ 548-50, pp. 193-94 (1953).

Since this report does not speak to the question of retention of capital punishment, the procedures for imposition of the death sentence, if it is to be retained, are likewise beyond its scope. Accordingly, section 1.1 explicitly limits the position against jury involvement in the sentencing process to non-capital cases, thus reserving the possibility of a role for the jury in death cases.

PART II. STATUTORY STRUCTURE AND JUDICIAL DISCRETION—RANGE OF ALTERNATIVES

2.1 General principles: statutory structure.

(a) All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

(b) The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.

(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

(d) It should be recognized that in many instances in this country the prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. Except for a very few particularly serious offenses, and except under the circumstances set forth in section 2.5(b) (special term for certain types of offenders), the maximum authorized prison term ought to be five years and only rarely ten.

DATE 1-26-77

COMMITTEE ON Judiciary Sen. BILL NO. 149 + 2

VISITOR'S REGISTER Please Note Bi

NAME	REPRESENTING	Check On: Support	Op
Fay Bruce	League of Women Voters of Montana		1
Grant Beatty	Montana Farmers Union	149 244	
[illegible]	Montana Septic Project	149	
[illegible]	Montana Justice Project	149	
Brent Shafer	Correspondent NWS Nugent	149 - 294	
Tom Hurley	Mont. Cty. Atty Assn	149-214	
Larry Elison	Law School -	interest	
Richard W Cowen	MT County Atty Assoc	149	

S.B. 115 - Senator Towe moved to amend by adding new language on page 3, line 21, as follows: "Section 2. Section 67-2219, R.C.M. 1947, is amended to read as follows:

'67-2219. Claim for abandoned property paid or delivered. Any person claiming an interest in any property delivered to the state under this act may file a claim thereto or to the proceeds from the sale thereof on the form prescribed by the state department of revenue, except that no claim for less than $10 may be filed.'" Motion carried.

Senator Warden moved to set the fee at $10. Motion carried. Senator Warden had to leave the meeting at this time - 4:00 p.m..

Senator Towe moved to amend the title, line 5, following "PROPERTY" by inserting "AND TO ABOLISH REFUNDS UNDER $10"; and to further amend the title, line 6, following line 5, by striking "SECTION" and inserting "SECTIONS", and following "67-2211" by inserting "AND 67-2219". Motion carried. (See Exhibit 1)

Senator Towe then moved that Senate Bill 115 as amended DO PASS. The motion carried unanimously.

S.B. 149 - Senator Towe moved to amend page 3, section 3, subsection (6), line 12, following "homicide" by inserting "as defined in subsection (1)(a) of 94-5-102". Motion carried.

Sen. Towe moved to amend page 4, section 5, line 20, following "leniency." by inserting "If the court does not impose a sentence of death and one of the aggravating circumstances listed in (section 3 of this act) exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense."; and to further amend S.B. 149 on page 7, section 11, subsection (2), line 3, following "death" by inserting "or life imprisonment". Motion carried.

Sen. Towe moved to amend page 6, following line 13, by adding a new section 11. Motion failed on a 3-4 vote. (Sen. Warden excused and Senators Murray, Olson and Towe voting for the motio

Senator Towe moved to amend page 8, section 12, subsection (2), line 1, following "death" by inserting "or life imprisonment Motion carried.

Senator Murray moved that Senate Bill 149 as amended DO PASS. The motion carried 5 - 2 with Senators Regan and Towe voting "No" and Senator Warden excused.

S.B. 214 - Senator Murray moved that S.B. 214 DO NOT PASS. The motion carried 6 - 1 with Senator Regan voting "No".

S.B. 153 - Senator Regan moved DO NOT PASS. (Senator Warden returned at this time - 4:30 p.m.)

ROLL CALL

JUDICIARY COMMITTEE

3:10 PM.

45th LEGISLATIVE SESSION - - 1977 Date 2-10-77

NAME	PRESENT	ABSENT	EXCUSED
TURNAGE, Jean, Chairman	✓		
ROBERTS, Joe, Vice-Chairman	✓		
MURRAY, William	✓		
OLSON, Stuart	✓		
LENSINK, Everett	✓		
REGAN, Pat	✓		
TOWE, Tom	✓		
WARDEN, Margaret	✓		

JUDICIARY COMMITTEE

45th Legislature

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
HB 814	provide that water rights & reservations of water are subject to future appropriation etc.	2-18	Com - Day	Wed 23	water table	2-24
SB 115	revise the requirements for listing unclaimed property	2-18	Towe	March 10 Thurs.	concurred in	3-11
SB 149	provide for the death penalty in certain cases. etc.	2-18	Hazelbaker	March 10	concurred in	3-17
SB 156	to adopt the revised uniform limited partnership act	2-18	Murray	March 11 Friday	table	3-11
SB 262	authorize the board of investments to execute deeds of transfer to transfer title of real estate etc.	2-18	Devine	March 10	concurred in	3-11
SB 346	prescribing or giving of a drug under conditions of medical necessity. etc.	2-18	Thomas	March 11	not concurred in	3-11

JUDICIARY COMMITTEE

March 10, 1977

The regular meeting of the House Judiciary Committee was called to order by Chairman Scully at 7:30 a.m. in room 436 of the Capitol Building, Helena, Montana on Thursday. Members not present were Representatives Colburn, Kennerly, Dussault and Keyser.

Scheduled for hearing were Senate Bills 101, 115, 149, and 262.

SENATE BILL #149:

SENATOR HAZELBAKER, DISTRICT #41:
This bill would provide for the death penalty in certain cases. And also to provide for a separate sentencing hearing and to determine the existence or nonexistence of aggravating or mitigating circumstances. He went on to explain what evidence may be presented, such as circumstances of the crime, the defendants character, background, history, mental and physical condition, and any other facts that might be admissable.

CHUCK O'REILLY, MONTANA JUSTICE PROJECT:
This came about primarily at the request of county attorneys across the state. They determine that one or two portions of current law might be constitutional but that in most cases it wasn't. You will notice in this bill it sets forth specific rules. They must be enumerated.

TOM DOWLING, COUNTY ATTORNEY ASSOCIATION AND PEACE OFFICERS:
If you are going to hang somebody this seems to be the constitutional way to do it. Both organizations will support the bill.

After some general discussion the hearing closed on Senate Bill #149.

SENATE BILL #101:

SENATOR JERGESON, DISTRICT #3:
This bill requires legislative approval of administrative rules before such rules, to which an objection has been filed by a legislator take permanent effect. If any five legislators during the first 7 legislative days object to a rule by filing a statement setting forth reasons for their objection, then the rule can be repealed effective the last day of that session. If a rule which is the subject of an objection is not approved by a joint resolution the secretary of state shall delete the rule from the administrative code. He went on to further explain the bill. As amended in the Senate, the rules promulgated during the interim might be challenged and would have to go through the legislative process to reinstigate the rule. It requires legislative input and legislative reliability. It would be a great step forward.

JUDICIARY COMMITTEE
EXECUTIVE SESSION

March 17, 1977

The House Judiciary Committee held an executive session in room 436 of the Capitol Building, Helena, Montana, on Thursday, March 17, 1977 at 8:30 a.m. Chairman Scully presided. All members were present except Representatives Colburn and Seifert.

SENATE BILL #402:
REPRESENTATIVE HAND moved to table. The motion carried with the vote unanimous.

CHAIRMAN SCULLY appointed the following representatives to a sub-committee to study Senate Bills 413 and 419.

Representative Kennerly
Representative Dussault
Representative Baeth
Representative Courtney
Representative Ramirez

The sub-committee will report on Tuesday the 22nd.

CHAIRMAN SCULLY appointed the following representatives to a sub-committee to study Senate Bills 33, 34 and 37.

Representative Lory
Representative Eudaily

CHAIRMAN SCULLY appointed Representative Lory to carry Senate Bill 53 when it goes to the floor. He also appointed Representative Keyser to meet with staff attorney Diana Dowling and prepare amendments for the bill.

SENATE JOINT RESOLUTION #16:
REPRESENTATIVE LORY moved to be "not concurred in". With the vote a tie the bill will go to the floor with no committee recommendation.

SENATE BILL #149:
REPRESENTATIVE KEYSER moved "be concurred in". The motion carried with Representative Lory and Dussault voting "no".

SENATE BILL #101:
This bill was back for committee action after having been voted for reconsideration. REPRESENTATIVE DUSSAULT moved the amendments. The motion carried with the vote unanimous. REPRESENTATIVE LORY moved "not concurred in as amended". REPRESENTATIVE DUSSAULT moved a sub-stitute motion "be concurred in as amended". The vote was called by roll call and carried 7 to 8, with 3 absent.

Yes		No	
Baeth	McLane	Conroy	Roth
Courtney	Teague	Hand	
Day		Kennerly	
Dussault		Eudaily	
Holmes		Lory	
Keyser		Scully	

SENATE BILL NO. 149

INTRODUCED BY HAZELBAKER

BY REQUEST OF THE MONTANA BOARD OF CRIME CONTROL

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR THE IMPOSITION OF THE DEATH PENALTY IN CERTAIN CASES; TO PROVIDE PROCEDURES AND REQUIREMENTS FOR THE AUTHORIZATION OF SUCH PENALTY; TO PROVIDE FOR A SEPARATE SENTENCING HEARING TO DETERMINE THE EXISTENCE OR NONEXISTENCE OF AGGRAVATING OR MITIGATING CIRCUMSTANCES; TO PROVIDE THAT THE DEATH PENALTY MAY NOT BE IMPOSED UNLESS THE COURT FINDS ONE OR MORE OF THE AGGRAVATING CIRCUMSTANCES AND FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY; TO PROVIDE THAT THE DETERMINATION OF THE COURT SHALL BE SUPPORTED BY SPECIFIC WRITTEN FINDINGS OF FACT; TO PROVIDE FOR AUTOMATIC REVIEW OF A JUDGMENT OF CONVICTION AND SENTENCE OF DEATH; AMENDING SECTIONS 94-5-102, 94-5-303, 94-5-617, AND 94-5-622, R.C.M. 1947; REPEALING SECTIONS 94-5-105, 94-5-304, AND 95-2206.1, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Sentence of death -- hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in [sections 3 and 4] for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

Section 2. Sentencing hearing -- evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Section 3. Aggravating circumstances. Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in

the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide AS DEFINED IN SUBSECTION (1)(A) OF 94-5-102 and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnaping which resulted in the death of the victim.

Section 4. Mitigating circumstances. Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under

the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

Section 5. Consideration of aggravating and mitigating factors in determining sentence. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in [sections 3 and 4] and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. IF THE COURT DOES NOT IMPOSE A SENTENCE OF DEATH AND ONE OF THE AGGRAVATING CIRCUMSTANCES LISTED IN [SECTION 3 OF THIS ACT] EXISTS, THE COURT MAY IMPOSE A SENTENCE OF IMPRISIONMENT FOR LIFE OR FOR ANY TERM

AUTHORIZED BY THE STATUTE DEFINING THE OFFENSE.

Section 6. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in [sections 3 and 4]. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

Section 7. Automatic review of sentence. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana as provided for in [sections 8 through 10].

Section 8. Review of death sentence -- priority of review -- time for review. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

Section 9. Transcript and records of trial transmitted. The clerk of the trial court, within 10 days

after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

Section 10. Supreme court to make determination as to the sentence. The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in [sections 3 and 4]; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

Section 11. Section 94-5-102, R.C.M. 1947, is amended to read as follows:

"94-5-102. Deliberate homicide. (1) Except as provided in ~~section~~ 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, ~~or~~ an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death OR LIFE IMPRISONMENT as provided in ~~section 94-5-105,~~ [sections 1 through 10 of this act] or by imprisonment in the state prison for any term not to exceed ~~one hundred (100)~~ years."

Section 12. Section 94-5-303, R.C.M. 1947, is amended to read as follows:

"94-5-303. Aggravated kidnaping. (1) A person commits the offense of aggravated kidnaping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the

victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) A person convicted of the offense of aggravated kidnaping shall be punished by death OR LIFE IMPRISONMENT as provided in ~~section 94-5-304,~~ [sections 1 through 10 of this act] or be imprisoned in the state prison for any term not to exceed ~~one hundred (100)~~ years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ~~ten (10)~~ years."

Section 13. Section 94-5-617, R.C.M. 1947, is amended to read as follows:

"94-5-617. Protection of life and health of infant. (1) A person commits the offense of criminal homicide, as defined in sections 94-5-101 through ~~94-5-105~~ 94-5-104, if he purposely, knowingly, or negligently causes the death of a premature infant born alive, if such infant is viable.

(2) Whenever a premature infant which is the subject of abortion if is born alive and is viable, it becomes a dependent and neglected child subject to the provisions of state law, unless:

(a) the termination of the pregnancy is necessary to preserve the life of the mother; or

(b) the mother and her spouse, or either of them, have agreed in writing in advance of the abortion, or within seventy-two (72) hours thereafter, to accept the parental rights and responsibilities of the premature infant if it survives the abortion procedure.

(3) No person may use any premature infant born alive for any type of scientific research, or other kind of experimentation except as necessary to protect or preserve the life and health of such premature infant born alive.

(4) The department shall make regulations to provide for the humane disposition of dead infants or fetuses.

(5) Violation of subsection (3) of this section is a felony."

Section 14. Section 94-5-622, R.C.M. 1947, is amended to read as follows:

"94-5-622. Penalties. (1) A person convicted of criminal homicide under this act is subject to the penalties prescribed by sections 94-5-101 through ~~94-5-105~~ 94-5-104.

(2) A person convicted of a felony other than criminal homicide under this act is subject to a fine not to exceed one thousand dollars ($1,000), or imprisonment in the state prison for a term not to exceed five (5) years, or both.

(3) A person convicted of a misdemeanor under this act

is subject to a fine not to exceed five hundred dollars ($500), or imprisonment in the county jail for a term not to exceed six (6) months, or both."

Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 16. Repealer. Sections 94-5-105, 94-5-304, and 95-2206.1, R.C.M. 1947, are repealed.

-End-